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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 978

RICHARD SYLVIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No.

RICHARD SYLVIA,
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UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Richard Sylvia, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on January 22, 1963.

Opinion Below

The opinion of the court below, printed in Appendix A hereto, *infra*, p. 9, is not as yet reported.

Jurisdiction

The judgment of the court below was entered on January 22, 1963. It is set forth on page 79 of the certified copy of Record Appendices and Proceedings in the court below, filed with this petition, and is also printed in Appendix A hereto, *infra*, p. 12. A petition for rehearing was filed January 29, 1963 (R.A.[1] 80-84.). Rehearing was denied on March 7, 1963. (R.A. 84.) The jurisdiction of this Court is invoked under 28 U.S.C. s. 1254(1).

Questions Presented

I. Is it fatally inconsistent for a defendant to take the stand and deny the commission of the crime charged and then assert his right to an instruction on the issue of entrapment?

II. Is it error for a trial judge to charge a jury that the burden of proving entrapment is on the defendant, without qualifying that statement in any way?

Constitutional and Statutory Provisions Involved

There are no constitutional or statutory provisions involved in this case.

Statement of the Case

On April 27, 1961, a four-count indictment was returned by a District of Massachusetts grand jury against petitioner charging him with offenses involving heroin, a narcotic drug. Counts one and two, although describing separate crimes, related to the same events which were alleged

[1] "R.A." refers to the certified copy of the Record Appendices and Proceedings in the court below.

to have occurred in Boston on November 24, 1960. Count one accused petitioner of selling, bartering, exchanging and giving away forty milligrams of heroin, without receiving a written order therefor, in violation of 26 U.S.C. s. 4705(a). Count two alleged that petitioner received, concealed, bought, sold and facilitated the transportation, concealment and sale of forty milligrams of heroin, knowing it to have been illegally imported into the United States, in violation of 21 U.S.C. s. 174. Counts three and four related to a single transaction which was averred to have taken place in Boston on November 25, 1960. Except for the date and quantity, count three was exactly like count one and count four was the same as count two. (R.[2] 2-3)

On May 1, 1961, petitioner pleaded not guilty.

The government's evidence warranted a finding that petitioner was approached by one Gibson, a government agent, and asked if he knew where a certain individual, Chandler, could be found. Petitioner stated that he did not know, but asked if he could help him. Gibson replied that he was interested in a "$5 bag." Petitioner replied that he could help him, and upon receipt of $5, produced a small paper bag from his pocket and gave it to Gibson. A conversation ensued indicating that petitioner knew the contents to be heroin, which, in fact, it proved to be. A similar transaction was repeated the following day. (Appendix A hereto, *infra*, p. 10.)

In his defense petitioner took the stand and testified that he met Gibson in a cafe; that Gibson asked him to go to a street corner and meet a man with a goatee and pick up two packages; that he did so; that Gibson reimbursed him for what he paid for the packages and that he delivered the packages to Gibson; that he did this as a favor to Gibson

[2] "R." refers to Record Appendix to Brief for Appellant filed in the court below.

and without knowledge of what was in them. (Appendix A hereto, *infra*, p. 10.)

There was also evidence that Gibson had been introduced to petitioner by one Hayes, a former addict who now was an informer paid by the Bureau of Narcotics to turn in peddlars of narcotics; and that prior to the sales, none of the government agents had any cause to believe that petitioner dealt in narcotics. (R. 33-35, 39-41, 59-60.)

At the close of the evidence and after argument of counsel, the trial judge instructed the jury, among other subjects, on the law of entrapment and its applicability to the case, and then charged the jury:

> "It's all a question of fact. The defendant who raises the defense of entrapment has the burden of proving entrapment. But the government has the burdent of proving beyond a reasonable doubt every other element of crime." (R. 24.)

Immediately after the conclusion of the charge, counsel for petitioner objected, saying:

> "I think the law is fairly clear that the burden of going forward is on the defendant, but the burden of proof is upon the Government. That is why I made the opening that I made: To put the Government on notice. I think the Government has the burden of proof.
>
> "It's like raising the question of insanity. You have the burden of going forward, and I think the burden of proof is upon the Government." (R. 24-25.)

Thereupon, the trial judge instructed the jury:

> "If there is any doubt about the matter, I want to make it quite clear that a person prosecuted for an

offense shall be acquitted if he proves that his conduct occurred in response to an entrapment.

"That is my instruction to you." (R. 25)

To that additional instruction, counsel for petitioner also objected.

Petitioner was found guilty on all four counts. He was sentenced to be imprisoned for a period of five years. The sentence was stayed pending appeal and petitioner filed seasonable notice of his appeal to the court below.

The court below affirmed the judgment of the district court, holding that the case fell "under the settled principle that a defendant's testimony to the effect that he did not commit the crime cannot raise an issue of entrapment;" that the district judge "should not have charged on entrapment at all;" that even if "the charge was legally inaccurate as well, . . . the defendant was (not) harmed;" and that "it cannot be prejudicial to permit him an extra defense." (Appendix A hereto, *infra*, p.)

Petitioner seasonably filed a petition for rehearing which as indicated was denied by the court below. (R.A. 80-84.)

The court below stayed its mandate.

Reasons for Granting the Writ

I.

The decision of the court below in the case at bar and in *United States* v. *Di Donna*, 2 Cir., 1960, 276 F.2d 956; *Rodriguez* v. *United States*, 5 Cir., 1955, 227 F.2d 912; *Eastman* v. *United States*, 9 Cir., 1954, 212 F.2d 320, upon the authority of which the instant case was decided, are directly in conflict with the decisions of *Hansford* v. *United States*, D.C. Cir., 1962, 303 F.2d 219, 221; *Crisp* v. *United*

States, 4 Cir., 1958, 262 F.2d 68, 70; and *Henderson* v. *United States*, 5 Cir., 1956, 237 F.2d 169, 173.

Moreover, the majority in *Sorrells* v. *United States*, 1932, 287 U.S. 435, 452; 53 S.Ct. 211, 216, and the minority in *Sherman* v. *United States*, 1958, 356 U.S. 369, 380, 78 S.Ct. 819, 824, both emphasized that entrapment lies in favor of a defendant, because "the government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct." Such a reason, it seems to petitioner, has nothing to do with the question of whether the accused admits or denies from the witness stand his involvement in the crime.

It would appear that the decisions of the Courts of Appeals for the District of Columbia and for the Fourth and Fifth Circuits are correct and that entrapment should be as available to a defendant who denies his guilt not only by his plea, but also by his testimony, as it is to an accused who denies his guilt merely by his plea.

The first question presented is undoubtedly of importance to the administration of the criminal law in the federal courts and the conflict should be resolved.

II.

No Court of Appeals has ever held, as charged by the district judge in the case at bar, that a defendant has the burden of proving entrapment. Although there are serious differences among the various Courts of Appeals as to what the Government is required to prove, they are in complete agreement that at least some part of the burden is on the Government.

Some cases seem to place the burden of proving the inducement on the defendant and of proving the defendant's prior disposition or criminal design on the Government. *United States* v. *Sherman*, 2 Cir., 1952, 200 F.2d 880,

—882, 883; *United States* v. *Sherman*, 2 Cir., 1957, 240 F.2d 949, 951, reversed on other grounds, 1958, 356 U.S. 369; *Masciale* v. *United States*, 2 Cir., 1956, 236 F.2d 601, affirmed, 1958, 356 U.S. 386; *Kivette* v. *United States*, 5 Cir., 1956, 230 F.2d 749, 754. This is now the rule in the First Circuit where the Court of Appeals has just defined the *quantum* of proof resting on the defendant to be "proof by a preponderance of the evidence". *Gorin* v. *United States*, 1 Cir., 1963, Nos. 5997-5999. Other Courts of Appeals seem to place the entire burden of proof upon the Government. These others require the Government to prove beyond a reasonable doubt that it did not induce the defendant to commit the crimes charged and, if there is evidence of inducement, either that the defendant had a prior disposition to commit the offense or that the Government had reasonable grounds to believe that the defendant was engaging in unlawful activities of the kind charged. *Washington* v. *United States*, 5 Cir., 1960, 275 F.2d 687, 689; *United States* v. *Landry*, 7 Cir., 1958, 257 F.2d 425, 429; *A. M. Spring Drug Co.* v. *United States*, 8 Cir., 1926, 12 F.2d 852, 856; *Marks* v. *United States*, C.A. 8, 1957, 250 F.2d 514, 516-518; *Carlton* v. *United States*, 9 Cir., 1952, 198 F.2d 795, 798; *Mitchell* v. *United States*, 10 Cir., 1944, 143 F.2d 953, 957. Still other cases seem to say that when there is evidence of inducement, the Government must prove a prior disposition and good cause for ensnaring the defendant. *Klosterman* v. *United States*, 3 Cir., 1957, 248 F.2d 191, 196; *Henderson* v. *United States*, 5 Cir., 1959, 261 F.2d 909, 910-911; *Heath* v. *United States*, 10 Cir., 1948, 169 F.2d 1007, 1010.

But whatever view is followed, every case dealing with or touching upon the burden of proof issue—and there are cases from the First, Second, Third, Fifth, Seventh, Eighth, Ninth and Tenth Circuits—has placed some part of the

burden of proof on the issue of entrapment on the Government.

It seems to petitioner that the issues dealing with the burden of proof, including the *quantum* of proof required if the burden of proving any part of the issue is placed on the defendant, are of great importance in the proper administration of criminal law in the federal courts and should be resolved definitively by this Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 6021.

RICHARD SYLVIA,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Manuel Katz, with whom *Paul T. Smith* and *Raymond J. Donat* were on brief, for appellant.

William J. Koen, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

January 22, 1963.

ALDRICH, *Circuit Judge*. Sylvia was found guilty by a jury of violating 26 U.S.C. §4705(a) and 21 U.S.C. §174 in connection with the sale of a small quantity of heroin. He appeals, not on the ground that the evidence was insufficient to support a conviction, but because the court placed upon him the burden of proving the defense of entrapment.

The government's evidence warranted a finding that Sylvia was approached by one Gibson, a government agent, and asked if he knew where a certain individual, Chandler,

could be found. Sylvia stated that he did not know, but asked if he could help him. Gibson replied that he was interested in a "$5 bag." Sylvia replied that he could help him, and upon receipt of $5, produced a small paper bag from his pocket and gave it to Gibson. A conversation ensued indicating that Sylvia knew the contents to be heroin, which, in fact, it proved to be. A similar transaction was repeated the following day. On this evidence, of course, a conviction was warranted and there was no issue of entrapment. See *Masciale* v. *United States*, 1958, 356 U.S. 386, 388; *Sandoval* v. *United States*, 10 Cir., 1960, 285 F.2d 803.

In his defense Sylvia took the stand and testified that he met Gibson in a cafe; that Gibson asked him to go to a street corner and meet a man with a goatee and pick up two packages; that he did so; that Gibson reimbursed him for what he paid for the packages and that he delivered the packages to Gibson; that he did this as a favor to Gibson and without knowledge of what was in them. This testimony, he asserts, warrants a finding of entrapment. We hold it did not, at least in view of the other instructions given to the jury, to the effect that if the government had failed to establish beyond a reasonable doubt that Sylvia knew there was heroin in the packages he did not have "possession" and could not be convicted. The defendant's testimony was to a single, indivisible episode, and was either to be accepted or rejected in its entirety.* The jury's verdict of guilty necessarily indicated its rejection. There was no basis left, in other words, for a finding of

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*While a jury normally may accept a witness' testimony in part and reject it in part, there comes a point where "fragmentation" becomes illogical. *Beradi* v. *Menicks*, 1960, 340 Mass. 396, 400; see *Hannon* v. *Hayes-Bickford Lunch System, Inc.*, 1957, 336 Mass. 268, 273. We think this is such a case. If Sylvia's testimony about not knowing what was in the packages is not credited, his whole story of deception amounting to entrapment collapses.

entrapment. This case falls under the settled principle that a defendant's testimony to the effect that he did not commit the crime cannot raise an issue of entrapment. *United States* v. *Di Donna*, 2 Cir., 1960, 276 F.2d 956; *Rodriguez* v. *United States*, 5 Cir., 1955, 227 F.2d 912; *Eastman* v. *United States*, 9 Cir., 1954, 212 F.2d 320.

The court should not have charged on entrapment at all. Even if, which we need not determine, the charge was legally inaccurate as well, we cannot see that the defendant was harmed. It cannot be prejudicial to permit him an extra defense. *Cf. Samson* v. *United States*, 1 Cir., 1928, 26 F.2d 769.

Judgment will be entered affirming the judgment of the District Court.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6021.

RICHARD SYLVIA,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

JUDGMENT

January 22, 1963.

This cause came on to be heard on appeal from the *United States District Court for the District of Massachusetts*, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) ROGER A. STINCHFIELD,

Clerk.

[cc: Messrs. Katz and Koen.]